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JOHN F. DONAHUE

IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No. - 293

JOSE MARIA GASTELUM-QUIÑONES, *Petitioner*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE
UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT**

DAVID REIN

JOSEPH FORER

FORER & REIN

711 14th St., N.W.

Washington, D.C.

Attorneys for Petitioner

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed an order of the United States District Court for the District of Columbia granting judgment against petitioner in a suit brought by him to enjoin his deportation from the United States.

OPINION BELOW

The court below issued no opinion. Its judgment is reproduced in Appendix A, hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1962 (2 R. 2). A timely petition for rehearing was filed on March 9, 1962 (2 R. 3), and was denied on May 7, 1962 (2 R. 6). This Court's jurisdiction arises under 28 U. S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals erroneously refused to reopen petitioner's deportation hearing on the ground that the evidence he sought to introduce, and could not have previously introduced, was not material, when petitioner's deportation had been previously sustained by the Court of Appeals because of the absence of such evidence.
2. Whether the Court of Appeals erred, and in effect denied petitioner judicial review, because after it had affirmed the deportation order on a misconstruction of the statute which eliminated judicial evaluation of the evidence according to standards established by decisions of this Court, it then sustained the refusal of the Board of Immigration Appeals to allow petitioner to prove that he was not deportable even under the court's construction.
3. Whether, in the light of *Rowoldt v. Perfetto*, 355 U. S. 115, and *Scales v. United States*, 367 U. S. 203, an alien is deportable solely on proof of past bare organizational membership in the Communist Party and without evidence that the membership was a "meaningful association."
4. Whether the government has the burden of proving, or the alien has the burden of disproving, that the former membership was a "meaningful association."

5. Whether the Court of Appeals violated at least the spirit of 28 U. S. Code, sec. 46, by transferring petitioner's appeal from the three-judge panel to which it was originally assigned to a panel of which it was clearly predictable that only two of the three judges would participate and of which only two did participate.

STATUTES INVOLVED

(1) Section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C), provides in part:

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
 * * *

"(6) is or at any time has been, after entry, a member of any of the following classes of aliens:
 * * *

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."

(2) Section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1252(b)(4), provides in part:

"No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

(3) 28 U. S. Code, sec. 46, provides:

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and contro-

versies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

STATEMENT OF THE CASE

This petition is in the same litigation as the pending petition for certiorari in *Gastelum-Quinones v. Kennedy*, No. 39, Oct. Term 1962, originally docketed as No. 520, Oct. Term 1961, and carried over to the current term. In No. 39, the petition seeks review of the affirmance by the Court of Appeals of the District Court's denial of a preliminary injunction against petitioner's deportation.* This petition seeks review of the court's affirmance of the final judgment entered by the District Court. Of the five questions presented by this petition, the first four are presented and discussed in the No. 39 petition.**

* Petitioner is still here to litigate only because on September 28, 1961, the Chief Justice stayed his deportation pending the filing and disposition of the No. 39 petition.

** The record filed in this case starts where the record in No. 39 ends. However, the record of the administrative proceedings in the deportation case is contained in the present record as D. Ex. A.

The petition in No. 39 was filed on October 27, 1961. In our reply to the government's opposition thereto, we advised the Court that after the filing of the petition the District Court had granted final judgment against petitioner; that petitioner had appealed therefrom to the Court of Appeals; and that in the event of another adverse decision by that court, we would again petition for certiorari. We suggested that this Court withhold action on the No. 39 petition pending determination by the Court of Appeals of the then pending appeal. Apparently this Court accepted that suggestion.

For the purposes of this petition, we adopt the contents of our petition in No. 39. We take up where the No. 39 petition stopped.

The Court of Appeals affirmed the denial of the preliminary injunction on September 13; 1961 (1 R. 5). On October 13, 1961, the respondent filed in the District Court a motion for summary judgment (1 R. 7). On October 25, 1961, the District Court granted summary judgment in favor of respondent and dismissed the complaint (1 R. 29).

Petitioner appealed to the Court of Appeals (1 R. 37). The respondent moved to affirm. The motion came before a division consisting of Circuit Judges Fahy, Danaher and Bastian. This division ordered sua sponte that the motion to affirm be referred to the division of the court which had decided petitioner's original appeal contesting the validity of the deportation order (2 R. 1). That division had consisted of Judges Edgerton, Dapaher and Bastian, but Judge Edgerton had not participated. (See *Gastelum-Quinones v. Rogers*, 286 F. 2d 824, also appearing in Appendix B to petition for certiorari in No. 39.) Fur-

thermore, the affirmance of the denial of the preliminary injunction had also been by only two judges, Judges Danaher and Bastian (1 R. 5).

The division to which the motion had been referred then affirmed the judgment of the District Court. The order of affirmance (to which this petition is addressed) recited, "Circuit Judge Edgerton took no part in consideration of the above motion" (2 R. 2).

Petitioner then filed a petition for rehearing by the court en banc (2 R. 3-5). The petition pointed out that because of Judge Edgerton's repeated non-participation, "each of appellant's three appeals has been decided by the same two judges, and none of his appeals has been considered by three judges. And the last appeal was transferred to a panel of which, predictably, only two judges would participate." The petition submitted that in view of the unusual situation, the only practicable method by which petitioner could have the benefit of consideration by more than two judges, in accordance with the intention of 28 U. S. Code, sec. 46, was to have the case reheard en banc. On May 7, 1962, the court denied the petition for rehearing (2 R. 6).

REASONS FOR GRANTING THE WRIT

As already indicated, the reasons for granting the writ as to the first four questions presented are fully set forth in our petition in No. 39, and will not be repeated here. The fifth question arises as the result of later developments in the litigation.

28 U. S. Code, sec. 46, requires that appeals be determined by a division of three judges or by the full court. While it provides, for obvious practical considerations, that two judges shall constitute a quorum

of a three-judge division, the clear basic intention is that decision shall be by three judges.

The appeal was initially assigned to a division of Judges Fahy, Danaher and Bastian. When this division referred the case to a division of Judges Edgerton, Danaher and Bastian, it must have known that Judge Edgerton would not participate. For although Judge Edgerton had been a member of the division assigned to the two earlier appeals involving the deportation proceeding, he had not participated. And in fact Judge Edgerton did not participate in the appeal following the reference. Thus the referral by the Fahy-Danaher-Bastian division to the Edgerton-Danaher-Bastian division was actually not a referral to another division at all; it was merely an elimination of Judge Fahy, which insured that appellant's appeal would be decided by only two judges, just as his previous appeals had been.

The course taken by the Court of Appeals violated at least the spirit of 28 U. S. Code, sec. 46. The statute's basic intent that decision be by three judges was vitiated by the transfer of the case to a panel of which, it was clear, only two judges would sit, and only two did sit.

Thus we have a curious climax to this curious litigation. Petitioner is faced with a cruel and irrational deprivation of his personal liberty. As our petition in No. 39 shows, the deportation order against him is erroneous on principle and probably under the decisions of this Court. The deportation order was sustained on the basis of an erroneous legal analysis adopted by the Court of Appeals entirely on its own, neither of the parties having ever advanced it. As a result, the court never reached the real issue in the case, namely, the burden-of-proof question which was

not settled by *Rowoldt v. Perfetto*, 355 U.S. 115. Nor did the court ever evaluate the evidence in the light of the *Rowoldt* standard. Then the Board of Immigration Appeals, incredulous that the court could have meant what it said, denied petitioner the opportunity to prove that he is not deportable even under the court's erroneous theory; in doing so, the Board relied on that part of the court's decision which favored the government, while rejecting that part which favored petitioner. When the case came back to the Court of Appeals, the court simply washed its hands of the matter, the appeal being decided summarily and without explanation by the same two judges who had created the untenable situation. Accordingly, petitioner has now had three appeals decided against him, without once having had a genuine judicial review by the Court of Appeals.

CONCLUSION

Certiorari should be granted in this case and in No. 39, and the judgments below reversed.

Respectfully submitted,

DAVID REIN

JOSEPH FORER

FORER & REIN

711 14th St., N. W.

Washington, D. C.

Attorneys for Petitioner

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APPENDIX A—The Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961
District Court
Civil Action 2565-61

No. 16,747

JOSE MARIA GASTELUM-QUEÑONES, *Appellant*,

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE
UNITED STATES, *Appellee*.

Before: EDGERTON, DANAHER and BAGLIA, *Circuit Judges*,
in Chambers.

ORDER

Upon consideration of appellee's motion to affirm and of
appellant's opposition, it is

Ordered by the Court that the judgment of the District
Court appealed from in this case is affirmed.

PER CURIAM.

Dated: Feb. 23, 1962.

Circuit Judge Edgerton took no part in consideration of
the above motion.